

1 ANDREW V. JABLON (SBN 199083)
E-Mail: ajablon@rpblaw.com
2 LINDSAY D. MOLNAR (SBN 275156)
E-Mail: lmolnar@rpblaw.com
3 RESCH POLSTER & BERGER LLP
9200 Sunset Boulevard, Ninth Floor
4 Los Angeles, California 90069-3604
Telephone: 310-277-8300
5 Facsimile: 310-552-3209

6 Attorneys for Defendant Robert Stein

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

11 AYMAN KANDEEL and
KIRKWOOD DREW,

Plaintiffs,

vs.

14 BRET SAXON, INSOMNIA MEDIA
15 GROUP, IMG FILM,
16 INCORPORATED, IMG FILM 14,
INC., ROB STEIN, and DOES 1-50,
inclusive.

Defendants.

Case No. CV11-02747 GW (AJWx)

**REPLY MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF DEFENDANT
ROBERT STEIN'S MOTION TO
DISMISS**

[CA CD Rule 7-12]

[REDACTED]

— 15 —

Trial Date: None Set

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 Plaintiffs want the Court to exercise its discretion to allow them to file yet
4 another amended complaint in a vacuum. For the second time, Plaintiffs have
5 declined to oppose Stein’s Motion to Dismiss. They no longer have the right to
6 amend, having amended the Complaint once, and must now seek leave of Court to
7 file a Second Amended Complaint (“SAC”). However, Plaintiffs request ignores
8 that the Court must first address the substantive issues in the Motion to Dismiss the
9 First Amended Complaint (the “Motion”) and analyze their defective First Amended
10 Complaint (“FAC”) to see if leave to further amend is even proper.

11 The *Declaration of Michael M. Baranov Re: Request To File A Second*
12 *Amended Complaint In Lieu of Opposition To Defendant Stein's Motion To Dismiss*
13 (the "Declaration"), however, concedes that the Motion is well taken as it confirms
14 that no Opposition is forthcoming. Moreover, the proposed SAC appended to the
15 Declaration, which other than dropping one cause of action makes *no* modifications
16 to the pleading, confirms that Plaintiffs are not able to cure the defects in their
17 claims against Stein. Accordingly, the Motion to Dismiss should be granted without
18 leave, and Stein dismissed with prejudice.

II. PROCEDURAL HISTORY

21 On April 5, 2011, defendant Robert Stein (“Stein”) filed a Motion to Dismiss
22 the Complaint, which was set for hearing on May 3, 2011. Instead of opposing the
23 Motion, Plaintiffs, as was their right, filed a First Amended Complaint (“FAC”) on
24 the day their opposition was otherwise due.

25 The FAC, however, made only minor modifications to the original Complaint.
26 Accordingly, pursuant to CD CA Rule 7-3, Stein requested that Plaintiffs meet and
27 confer in advance of his filing of a *Motion to Dismiss the First Amended Complaint*.
28 At this meeting counsel for Plaintiffs stated that he believed the allegations of the

1 FAC were sufficient. Stein, therefore, proceeded with filing the instant Motion to
 2 Dismiss the First Amended Complaint (the “Motion”), which was set for hearing on
 3 May 23, 2011.

4 Pursuant to CD CA Rule 7-9, Plaintiffs Ayman Kandeel and Kirkwood Drew
 5 were *required* to file any Opposition to the Motion not later than May 2, 2011, i.e.,
 6 twenty-one (21) days before the date designated for the hearing of the instant
 7 Motion. Alternatively, if Plaintiffs were not going to oppose the Motion, they were
 8 *required* to have filed a Notice of Non-Opposition on or before the same date. *Id.*
 9 Plaintiffs did neither.

10 Accordingly, on May 4, 2011, Stein filed with this Court a *Notice Of*
 11 *Plaintiffs’ Failure To Oppose Defendant Robert Stein’s Motion To Dismiss And*
 12 *Request For Immediate Ruling On Submitted Papers In Lieu Hearing Because Of*
 13 *Failure By Plaintiffs To Oppose The Motion* (the “Notice”). The Notice requested
 14 that, in accordance with CD CA Rule 7-12 and *Ghazali v. Moran*, 46 F.3d 52, 53-54
 15 (9th Cir. 1995), the Court deem the failure to file an objection as consent to granting
 16 the Motion. Further, pursuant to the relief requested in the Motion to Dismiss the
 17 First Amended Complaint, Stein requested that the Court immediately grant the
 18 Motion dismissing the First Amended Complaint *with prejudice*.

19 Now, Plaintiffs’ counsel, Michael Baranov, has filed the Declaration,
 20 confirming that he did not and had no intention of filing an Opposition to the
 21 Motion. Instead, counsel asserts that he planned on simply requesting leave to
 22 amend the First Amended Complaint at the hearing on May 23, 2011. He does not
 23 dispute *any* of the legal arguments raised in the Motion, he just asserts, without any
 24 legal support, that he wants yet another attempt at pleading a valid cause of action.

25

26 **III. LEGAL ARGUMENT**

27 Having conceded the propriety of the Motion by way of the non-Opposition,
 28 it is not disputed that the Motion should be granted. Plaintiffs’ request to be allowed

1 leave to amend, however, should be denied as they seek to file a Second Amended
2 Complaint that does not address any of the defects in the original or First Amended
3 Complaint.

4 The proposed SAC that is appended to the Declaration makes only *one*
5 change to the pleading – it drops the RICO cause of action. There are no other
6 changes to the other *ten* causes of action. In other words, despite being advised of
7 the pleading defects in both the original Motion to Dismiss and the Motion to
8 Dismiss the First Amended Complaint, the Proposed SAC:

9 1. does *not* provide any facts to support (or even articulate the
10 elements of) an alter ego claim (*see* Motion, Section II(B), Pg. 13);

11 2. does *not* provide any facts to support Stein being liable for a
12 purported fraud committed by his employer (*see* Motion, Section II(C), Pg. 16-20);

13 3. does *not* cure the defects in the claim for Money Had and
14 Received (e.g., still does not plead that Stein, or any defendant, received money for
15 Plaintiffs' benefit and, in any event, the claims are time barred) (*see* Motion, Section
16 II(E), Pg. 29-30);

17 4. does *not* address the time-barred nature of the conversion claim
18 (*see* Motion, Section II(F), Pg. 31);

19 5. does *not* remove the legally invalid claims of "constructive trust"
20 and "unjust enrichment" (*see* Motion, Section II(G) and (H), Pg. 31-33);

21 6. does *not* provide any facts to support a claim for accounting
22 generally, or as to Stein whom they acknowledge is not a party to the contract
23 causes of action. (*see* Motion, Section II(I), Pg. 33-34)

24 The proposed Second Amended Complaint evidences that Plaintiffs are not
25 able to cure the defects identified in Motion. Although *Fed. R. Civ. P.* 15(a)
26 provides that the "court should freely give leave [to amend] when justice so
27 requires", such leave is properly denied when the proposed amendment would be
28 futile. *Adorno v. Crowley Towing And Transp. Co.*, 443 F.3d 122 (2006).

1 Denial of leave to amend based on futility is warranted if
2 the proposed claim would not survive a motion to dismiss.
3 *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099
4 (D.C.Cir.1996). An amended complaint is futile if it
5 merely restates the same facts as the original complaint in
6 different terms, reasserts a claim on which the court
7 previously ruled, fails to state a legal theory or could not
8 withstand a motion to dismiss. *Robinson v. Detroit News,*
9 *Inc.*, 211 F.Supp.2d 101, 114 (D.D.C.2002) (quoting 3
10 *Fed. Prac. 3d* § 15.15[3]).

11 *Rumber v. Dist. of Columbia*, 598 F. Supp. 2d 97, 102 (D.D.C. 2009) aff'd, 595 F.3d
12 1298 (D.C. Cir. 2010).

13 As detailed in the Motion, and referenced above, the defects identified in the
14 FAC simply cannot be cured. Plaintiffs cannot plead around the statute of
15 limitations, cannot plead around the legal fiction that is several of their claims, and
16 cannot plead around the lack of liability of an employee for the alleged tort of his
17 principal. In fact, Plaintiffs' proposed SAC *made no attempt to address these*
18 *defects*. Leave to amend should, therefore be denied, as Plaintiffs' proposed SAC
19 makes it "absolutely clear that no amendment can cure the defects." *Lucas v. Dep't*
20 *of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995).

21 Dated: May 5, 2011

RESCH POLSTER & BERGER LLP

22

23

24

By: _____ /S/
ANDREW V. JABLON
Attorneys for Defendant Robert Stein

25

26

27

28